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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.141 OF 2015

Principal Commissioner of
Income Tax-29, Mumbai ...Appellant
vs.
Quick Builders ...Respondent

Mr.Arvind Pinto for the appellant
Mr.Vishnu S. Hadade for the respondent

CORAM : A.S.OKA, &
A.K.MENON,JJ.
DATE : OCTOBER 30, 2017

P.C.:

1 Heard the learned counsel for the appellant and the learned counsel for the respondent. The respondent-assessee is carrying on business as builder and developer. In the facts of this case, we are concerned with the previous year 2006-2007. The respondent-assessee filed a return declaring total income of Rs.51,41,467/- on the basis of turn-over of approximate 12.75 crores. The net profit shown by the respondent-assessee was at the rate 4.67%.

2 While passing the assessment order, the Assessing Officer (AO) relied upon the computation of industrial margin for construction for various builders and developers as recorded in paragraph 6.2 of the assessment order. Based on the said data, he proceeded to calculate the profit by using

Capitaline database Version 3.1.0.6 at 12.8%. He made functional adjustment of 1%. The shortfall was calculated at the rate of 7.13%. He made upward adjustment to profit at Rs.90,96,499/-. The assessment order was challenged by the assessee before the Commissioner of Income Tax (Appeals). By order dated 17th December 2010, the appeal was dismissed. While dismissing the appeal, following findings were rendered by the First Appellate Authority:

> "4.5 The appellant has stated that during the previous year pertaining to assessment year 2007-08 it is only the contractual sale and no construction contract receipts and hence results for assessment year 2007-08 should not be disturbed. This plea is no more sustainable in view of defects pointed out. Since the books of accounts are defective the result are liable for rejection and hence are rejected.
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> 4.6 Having done so now I come to the elaborate discussion and working made by Assessing Officer in his assessment order as reflected in para 6.1, 6.2 and 6.3. The Assessing Officer has taken the average profit margin of the industry basis on a profit margin of selected comparable cases with the data available on Capitaline i.e 12.80% and has made the addition for the difference from the average profit margin of

> 12.80% and that shown by appellant which is 4.67%. Thus, for the difference of 7.13% in the profit margin addition of Rs.90,96,499/- has been made which I find is fully justified in view of the fact that books of accounts are maintained in a way by the appellant that they do not reflect profit or loss on contract work undertaken separately from their project work and further they do not reflect any profit as they claim to follow project completion method. Accordingly the addition made by the Assessing Officer for an amount of Rs.90,96,381/- is sustained."

3 The matter was carried by way of appeal by the respondent-assessee before the Income Tax Appellate Tribunal, J-Bench, Mumbai (Appellate Tribunal). By the impugned judgment and order which is subjected to a challenge by the appellant-revenue, the appeal filed by the respondent-assessee was allowed.

4 The learned counsel for the appellant-revenue submits that the substantial questions of law set out in paragraphs 6.1 to 6.3 arise in this appeal. The learned counsel for the respondent has no objection if the appeal is forthwith taken up for final disposal on the aforesaid substantial questions of law.

5 After having heard the submissions of the learned counsel for the appellant and the learned counsel for the respondent, we find that the

impugned Judgment and order borders on perversity. We have already quoted paragraph 4.5 of the order of the first Appellate Authority in which a finding of fact was recorded that the Books of Accounts maintained by the assessee were defective and liable for rejection. This finding of the First Appellate Authority is brushed aside by the Appellate Tribunal by observing that the said finding recorded by the First Appellate Authority that Books of Accounts of the respondent-assessee were defective has been recorded without following principles of natural justice. No other reason is recorded for setting aside the said finding. After recording the said reason, all that the Appellate Tribunal has recorded is that it is not the case of the Appellant-revenue during the year under consideration that the assessee's net profit margin was not comparable with previous assessment years. Thereafter, the Appellate Tribunal observed that considering the facts in totality and in particular the manner in which the assessment order is framed, the additions made by the AO are uncalled for.

6 As indicated earlier, no cogent reasons have been recorded by the Appellate Tribunal for setting aside the finding of the First Appellate Authority in paragraph No.4.5 of its Judgment. The finding was recorded in the Appeal preferred by the respondent-assessee through his Chartered Accountant who was present at the time of hearing and that his submissions were specifically heard and recorded.

Therefore, by no stretch of imagination, the Appellate Tribunal could have held that the finding recorded in paragraph 4.5 of the Judgment of the First Appellate Authority was recorded without following principles of natural justice. As stated earlier, no other reason has been recorded by the Appellate Tribunal for upsetting the findings recorded in paragraph 4.5 of the Judgment of the First Appellate Authority.

7 Hence, in our view, the Appellate Tribunal has not done its duty. Considering the nature of the aforesaid findings and considering the fact that detailed reasons have not been assigned for setting aside the assessment order, this is a fit case for *de-novo* consideration of the Appeal preferred by the appellant.

8 Accordingly, the appeal must succeed in part and we pass the following order:

(I) Impugned Judgment and order dated 21st March 2014 in Income Tax Appeal No.1780/Mum/2011 is hereby quashed and set aside and the said Appeal is restored to the file of the Income Tax Appellate Tribunal, J Bench, Mumbai;

(II) The appeal shall be decided by the Appellate Tribunal afresh in the light of the observations made in this Judgment and order;

(III) Considering the fact that the appeal is of the year 2011, we are sure that the

Appellate Tribunal will give necessary priority to the hearing of the appeal;

(IV) For the purpose of fixing the date for hearing, the parties shall appear before the Appellate Tribunal on Monday 4th December 2017 at 11.00 a.m;

(V) All contentions on merits of the Appeal are kept open;

(VI) Appeal is partly allowed on above terms with no order as to costs.

(A.K.MENON,J.) (A.S.OKA,J.)